

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re CHRISTINE L., a Person Coming
Under the Juvenile Court Law.

B219455

(Los Angeles County
Super. Ct. No. CK78165)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

H. L.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

Christine L. was declared a dependent child after her two cousins sexually abused her. In addition to allegations of sexual abuse, the court also sustained allegations that father, H.L., was unable to provide care for Christine because of his substance abuse.

Father challenges the findings of sexual abuse, arguing that the juvenile court improperly relied on hearsay statements and incorrectly determined that Christine was at risk of future abuse. We reject these arguments and find that overwhelming evidence supported the juvenile court's findings of sexual abuse. We affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Amended Petition*

As later sustained, the Los Angeles County Department of Children and Family Services (DCFS) alleged that Christine had been sexually abused by two male paternal cousins. Specifically, DCFS alleged that Christine's cousins vaginally and anally penetrated Christine with their penises. DCFS alleged that father failed to protect Christine from sexual abuse when he knew of it. DCFS also alleged that father used alcohol, marijuana, methamphetamine, and cocaine, rendering him unable to provide regular care for Christine. DCFS alleged that father's drug use and the sexual abuse endangered Christine's physical and emotional health and safety and placed her at risk.

At the time DCFS filed the amended petition, Christine was nine years old and lived with father, along with her two older brothers, who were not named in the petition. Christine's male cousins were approximately 15 and 17 years old. Throughout the dependency proceeding, Christine was placed in mother's custody, while her brothers remained in father's custody.

2. *The Social Workers' Reports*

DCFS reported that Christine disclosed to mother that her cousins had sexually abused her two years earlier.¹ Christine told mother that she had disclosed the abuse to father a month earlier. According to Christine, she told father that she had had sex with her cousins. Father responded, ““You don’t know what you’re talking about. Don’t be stupid.”” Christine was afraid to tell her mother about the abuse because she felt “stupid for letting it happen”

When DCFS interviewed father about these allegations, father responded, ““[s]he only told me they were kissing her.”” Father told a social worker that he reported the abuse to the paternal aunt but was unaware as to whether she took any action. Christine’s paternal aunt denied having had any conversation with father about Christine’s cousins’ conduct. Father also reported that Christine’s cousins lived in the “back house” with the paternal aunt.

DCFS reported that Detective Janet O’Bryan interviewed Christine. During the interview, Christine shared that she had had sexual intercourse with her paternal cousins approximately five times. DCFS further reported that Christine’s cousins admitted to the sexual abuse. One of them informed Detective O’Bryan that Christine ““complained that it hurt in the front so [he] turned her over and hit the back.”” The other also admitted to having engaged in sexual conduct more than five times.

Police records attached to and incorporated in the social workers’ reports indicated that Christine told a deputy sheriff that one of her cousins put his penis in her vagina and moved his body back and forth on top of her. Christine asked her cousin to stop because it hurt her. Christine described a similar incident with her other cousin. Christine reported that she had sexual intercourse five times with her

¹ The amended petition did not name mother, and she is not a party to this appeal.

cousins. When Christine told father that she had sex with her cousins, he asked her not to tell mother. In another interview, Christine described three incidents in which one of her cousins put his penis inside her vagina. Christine's other cousin penetrated her vagina with his penis and digitally penetrated her anus. Christine stated that all of the incidents occurred while she was in second grade.

Christine's cousins admitted to having sexual contact with her. One admitted to putting his penis in Christine's anus once and in her vagina twice.² The other admitted to vaginal intercourse twice and anal intercourse five times. In a separate interview, one cousin admitted to having anal sex with Christine and the other admitted only to having rubbed his erect penis on Christine's anus.³

3. *Jurisdictional Hearing*

No one testified at the jurisdictional hearing. Father's counsel argued that there was no serious future risk of harm to Christine. Counsel argued that "[i]n this case I don't think anyone here is denying that what happened to this child was serious," but the acts were not recent, and the perpetrators were "not in this child's life anymore." Christine's attorney argued that the court should take jurisdiction.

² Christine's cousins also described their conduct with another female cousin. Christine indicated her female cousin demanded that she have sex with her male cousins.

³ DCFS also documented father's drug use. DCFS reported that father admitted to drinking alcohol, smoking marijuana, and using cocaine and methamphetamine. Father described himself as a "[f]unctional drug user" and denied that his drug use impeded his ability to care for Christine. Christine reported that father drank beer and smoked cigarettes. Christine's brothers were aware of father's drug use. Mother described father as an alcoholic, and reported that father used marijuana, cocaine, and methamphetamine.

4. *Court Findings*

The court sustained the amended petition. It found that Christine was raped and sodomized and later told father what had happened. The court found father's response was inappropriate. The court was concerned about father's ability to protect Christine both from her cousins and from other men. The court indicated that father's use of drugs had been well established.

The court terminated jurisdiction and issued a custody order. The court awarded mother sole physical custody, and father was granted unmonitored visits three times per week. Father appealed from the juvenile court's jurisdiction and disposition orders.

DISCUSSION

1. *The Appeal Is Not Moot*

The court's orders are appealable even though the court terminated jurisdiction. (See *In re J.K.* (2009) 174 Cal.App.4th 1426, 1432 [finding appeal was not moot where sustained jurisdictional findings affected father's custody]; *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548 [same]; *In re Kristin B.* (1986) 187 Cal.App.3d 596, 605; but see *In re Dani R.* (2001) 89 Cal.App.4th 402, 404-405 [finding appeal moot where father stipulated to jurisdictional order]; *In re Michelle M.* (1992) 8 Cal.App.4th 326, 330 [finding appeal moot where jurisdiction terminated].) "The fact that the dependency action has been dismissed should not preclude review of a significant basis for the assertion of jurisdiction where exercise of that jurisdiction has resulted in orders which continue to adversely affect appellant." (*In re Joshua C.*, *supra*, 24 Cal.App.4th at p. 1548.) Here, the juvenile court's orders continue to affect father because he lost physical custody of Christine and his contact with her is limited.

2. *Overwhelming Evidence Supports the Finding that Christine Had Been Sexually Abused by Members of her Household (Welfare & Inst. Code, § 300, subd. (d).)*⁴

To determine whether substantial evidence supports the jurisdictional order, we review the record in the light most favorable to the juvenile court's order. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 732.) Conflicts in the evidence are resolved in favor of the prevailing party. (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564.) “‘The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.’ [Citation.]” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1394.)

Section 300, subdivision (d), the only statute under which the court sustained the allegations of sexual abuse, provides that a child is a dependent of the juvenile court if “[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.”⁵

⁴ Undesignated statutory citations are to the Welfare and Institutions Code.

⁵ Penal Code section 11165.1 provides in part: “As used in this article, ‘sexual abuse’ means sexual assault or sexual exploitation as defined by the following: [¶] (a) ‘Sexual assault’ means conduct in violation of one or more of the following sections: Section 261 (rape), subdivision (d) of Section 261.5 (statutory rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b), or paragraph (1) of subdivision (c) of Section 288 (lewd or lascivious acts upon a child), 288a (oral copulation), 289 (sexual penetration), or 647.6 (child molestation). [¶] (b) Conduct described as ‘sexual assault’ includes, but is not limited to, all of the following: [¶] (1) Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or

Overwhelming evidence supported the juvenile court's findings that Christine had been sexually abused by a member of her household. Christine repeatedly reaffirmed that both of her cousins penetrated her vagina with their penises. Minor inconsistencies in her description do not undermine the juvenile court's ultimate conclusion that Christine's cousins had sexually abused her. Additionally, Christine's cousins' admissions amply support the juvenile court's assumption of jurisdiction. (*In re Carlos T.* (2009) 174 Cal.App.4th 795, 804 [child's statement that father "play[ed] with [his] front private part" and "touched his 'butthole' with something hard" sufficient to support jurisdiction]; *In re Mariah T.* (2008) 159 Cal.App.4th 428, 440 [substantial evidence supported jurisdiction where household member fondled child near her crotch].)

3. *Father Demonstrates No Error in Relying on Christine's Hearsay Statements*

Christine's hearsay statements were properly admitted under section 355, which provides: "A social study prepared by the petitioning agency, and hearsay evidence contained in it, is admissible and constitutes competent evidence upon which a finding of jurisdiction pursuant to Section 300 may be based, to the extent allowed by subdivisions (c) and (d)." (§ 355, subd. (b).) Section 355, subdivision (c), in turn, provides that hearsay evidence is admissible if the declarant is under

not there is the emission of semen. [¶] (2) Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person. [¶] (3) Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, except that, it does not include acts performed for a valid medical purpose. [¶] (4) The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose."

the age of 12 and is the subject of the jurisdictional hearing, unless the statements were the product of fraud, deceit, or undue influence. (§ 355, subd. (c)(1)(B).) Here, Christine was under the age of 12 and the subject of the jurisdictional hearing. There was no claim that her statements were the product of fraud, deceit, or undue influence. Thus, her hearsay statements were admissible.

Father's reliance on *In re Lucero L.* (2000) 22 Cal.4th 1227, is misplaced. *Lucero* concludes that section 355 generally authorizes "admittance of and reliance on the hearsay statements of a child victim contained in a social study." (*Id.* at p. 1231.) However, *Lucero* questioned whether hearsay statements of a child who was the subject of the jurisdictional hearing were admissible where the child was deemed incompetent because he or she could not understand the obligation to tell the truth or lacked the ability to distinguish between truth and falsity. (*Id.* at p. 1231.) Here, there was no claim that Christine was incompetent or that she lacked the ability to distinguish between truth and falsity. Therefore, the general rule under section 355 is applicable, and her hearsay statements were properly admitted.

4. *Father's Argument Regarding an Alleged Absence of Future Risk Lacks Merit*

Citing *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820 and *In re David M.* (2005) 134 Cal.App.4th 822, 829, father argues that the requirement of serious physical harm or illness or a substantial risk of serious harm or illness requires "a showing that at the time of the jurisdiction hearing the child is at substantial risk of serious physical harm in the future" Father also argues that there was no current risk of sexual abuse.

In re Rocco M. and *In re David M.* apply section 300, subdivision (b), not section 300, subdivision (d), under which the juvenile court sustained the

allegations of sexual abuse.⁶ There is a split of authority regarding whether under section 300, subdivision (b) a showing of current risk of serious physical harm is required. (Compare *In re J.N.* (2010) 181 Cal.App.4th 1010, 1025 [evidence must show current risk to exercise jurisdiction under § 300, subd. (b)]; *In re Savanna M.*, *supra*, 131 Cal.App.4th at pp. 1395-1397 [child not described within § 300, subd. (b), where no current risk of molestation shown]; with *In re J.K.*, *supra*, 174 Cal.App.4th 1426, [evidence of prior harm sufficient to sustain § 300, subd. (b) finding].) However, section 300, subdivision (d) contains no requirement for a finding of current risk. (*In re Carlos T.*, *supra*, 174 Cal.App.4th at p. 803.) Because the juvenile court sustained the findings only under section 300, subdivision (d), we need not consider whether Christine was at risk of being sexually abused at the time of the jurisdictional hearing.⁷

5. *Father Forfeited Any Argument Regarding His Substance Abuse as a Basis for Jurisdiction*

Father raises no issue with respect to the trial court's finding that his substance abuse prevented him from providing regular care to Christine. He

⁶ Under section 300, subdivision (b), jurisdiction is proper if “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child”

⁷ In any event, even if there were a requirement DCFS demonstrate a risk of current abuse at the time of the jurisdictional hearing, there was evidence to support such a finding. Although Christine's cousins were not in father's home at the time of the hearing, there was no evidence when they might return. Moreover, the court expressed concern that father would not protect Christine from “any man, young or old, that comes near his nine-year-old daughter.” The court's conclusion was supported by evidence that father did nothing after learning that Christine's cousins had sexually abused her and by the absence of any evidence that he would respond appropriately in the future.

therefore forfeited this issue. (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115 [appellant forfeits an issue by failing to raise it in his opening brief].) In any event, the trial court properly assumed jurisdiction over Christine under section 300, subdivision (d) based on the sexual abuse, and we need not consider whether father's admitted substance abuse constituted a sufficient alternative ground for jurisdiction. (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397 [purpose of dependency proceeding is to protect child, and child is a dependent if any action of either parent brings child within a statutory definition of a dependent].)

DISPOSITION

The juvenile court's orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.